



POLICE DEPARTMENT

May 5, 2011

MEMORANDUM FOR: Police Commissioner

Re: Police Officer Hairo Franco
Tax Registry No. 932661
Police Service Area No. 8
Disciplinary Case No. 85733/09

The above-named member of the Department appeared before me on January 11, 2011, charged with the following:

1. Said Police Officer Hairo Franco, assigned to the Police Service Area 8, while on duty, at or about 1835 hours, on April 14, 2008, in the vicinity of 2816 Schley Avenue, Bronx County, abused his authority as a member of the New York City Police Department in that he stopped Demaurice Andrews without sufficient legal authority.

P.G. 212-11, Page 1, Paragraph 1 – STOP AND FRISK

2. Said Police Officer Hairo Franco, assigned to the Police Service Area 8, while on duty, on April 14, 2008, inside of the Police Service Area 8 stationhouse, Bronx County, used excessive force against Demaurice Andrews, in that he wrongfully pushed him against a wall.

P.G. 203-11, Page 1, Paragraph 2 – FORCE

3. Said Police Officer Hairo Franco, assigned to the Police Service Area 8, while on duty, on April 14, 2008, outside of the Police Service Area 8 stationhouse, Bronx County, used excessive force against Demaurice Andrews, in that he wrongfully pushed him against a patrol vehicle and slammed his head against the hood of said vehicle.

P.G. 203-11, Page 1, Paragraph 2 – FORCE

The Department was represented by Mary Lynne Frey, Esq., Department Advocate's Office, and Laura Edidin, Esq., Civilian Complaint Review Board. The Respondent was represented by Michael Martinez, Esq.

Respondent, through his counsel, entered a plea of Not Guilty to the subject charges. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

Respondent is found Not Guilty.

SUMMARY OF EVIDENCE PRESENTED

The Department's Case

The Department called DeMaurice Andrews and Isaiah Stewart as witnesses.

DeMaurice Andrews

Andrews, a 35-year-old resident of the Bronx, is currently unemployed. In 2001, he was convicted of a weapons charge and was sentenced to five years on probation. On April 14, 2008, he was working as a construction worker. After work that day, he went to his uncle's house on Schley Avenue to retrieve a W-2 form that he had previously left there. He intended on going to H & R Block to file his taxes afterwards. A family friend, Javier Ruiz, drove him to the uncle's building, which was located in a public housing complex. Ruiz double-parked and waited inside the car while Andrews got the tax document. Andrews had called ahead, and his uncle met him outside of the building.

Andrews shook his uncle's hand, and the uncle gave him the W-2 form, which had two or three pay stubs stapled to it. Andrews looked at the papers, folded them, and stuck them in his shirt pocket.

As Andrews walked toward Ruiz' car and his uncle walked back toward the building, Respondent and his partner approached. The officers were dressed in uniform and were driving a marked Department vehicle. Respondent grabbed Andrews firmly by the right shoulder and loudly asked him if he lived in the building. Respondent made Andrews feel like he was not free to leave. Andrews believed that he would be arrested if he attempted to get away. While Andrews is 5'9" tall and weighs 160 or 170 pounds, Respondent is between 6'0" and 6'4" tall and weighs 250 pounds. Andrews calmly

from his uncle. When he started to reach into his pocket to get the paperwork, Respondent "snatched [his] hand away." Respondent proceeded to take the paperwork out of Andrews' pocket himself. After reviewing the paperwork, Respondent checked Andrews' other pockets. Andrews stated, "[Respondent] dug into my left front [pants] pocket. He pulled out my keys, my cigarettes. He opened [the cigarette pack] and looked inside." Respondent then replaced the items back in the pocket.

Andrews testified that he started to get a little loud because he did not understand why Respondent was "all over [him] and in [his] pockets." When Andrews asked why he was stopped, Respondent replied that the police can stop anyone they want. Respondent went on to explain to Andrews that there were a lot of robberies and drug activity in the neighborhood. When Andrews called to his uncle, Respondent became upset and told him, "Your ass is going down." At that point, Respondent started to handcuff Andrews.

Andrews responded by asking Respondent, "What the fuck am I being arrested for?"

This was the first time that Andrews used profanity with Respondent. In addition, Andrews told Respondent that the handcuffs were too tight. He explained to Respondent that he had been in a car accident that left him with injuries to his left wrist. Although the accident took place in September 2007, Andrews still has visible scars on the wrist area.

Andrews' uncle approached the scene and asked what was going on. The uncle also told Respondent to be careful with Andrews' wrist. Respondent shoved Andrews against the Department vehicle and told him, "Get your ass in the car or I'm going to kick your ass in the car." Respondent replied that he could not enter the car from that side because it would have required him to lean on his left wrist. Respondent grabbed Andrews by the handcuffs, shoved him down into the car, and told him again, "Get the fuck in the car or I'm going to kick you in the car." At no point did Respondent loosen the handcuffs. Meanwhile, Respondent's partner remained quiet and professional throughout the encounter.

Upon arriving at the station house, the officers instructed Andrews to step out of the car. Andrews explained to them that he could not get up because he was lying on his left side and the cuff was digging into his hand. Respondent dragged him across the seat and out of the car. As they entered the station house, Respondent shouted at him, "You better hope you don't have any warrants because I'm going to bury your ass in the system." When Andrews' uncle, who had followed the Department vehicle to the station house, started to follow the officers inside the building, Respondent told him, "You're not going a fucking place. You're _ _ wait outside."

Once inside the command, Respondent pushed Andrews against a wall and told him to "shut the fuck up." Respondent also pushed Andrews against the bars of the cell and into the cell. Andrews was being compliant during this period. After being placed in the cell, Respondent removed the handcuffs. After approximately 45 minutes, Respondent informed Andrews that he was free to go. He also told Andrews, "You're lucky you didn't have any warrants or I'd have buried your ass in the system." As Andrews was walking out of the building, he turned back and told Respondent to "stop acting like a faggot." At that point, Respondent jumped on him, causing him to "kind of buckle." Andrews heard his mother telling him to relax, and Andrews gave Respondent his right hand. Respondent grabbed him, handcuffed him again, and slammed him down on the hood of a car. In addition to Andrews' mother, his stepfather, his uncle, Ruiz, and two or three other people were present at the scene.

Respondent brought Andrews back inside and shoved him back into the holding cell. Respondent then took off his gun belt and also entered the cell. Andrews believed that Respondent was going to beat him up. He told Respondent, "If you hit me, take the cuffs off, and I'm going to hit you back." Andrews was scared because Respondent is such a large man. At that point, a supervising member of the service walked by and asked what was going on. The supervisor told Respondent to leave the cell and took the handcuffs off of Andrews. The supervisor subsequently released Andrews from custody. Andrews has not filed a civil lawsuit regarding the incident.

On cross-examination, Andrews testified that Respondent did not strike or kick him while they were in the cell together. Andrews received summonses as a result of the

incident Respondent placed the summonses on a table inside the holding area, and Andrews was later given the summonses by a family member

Upon his arrival at the station house, Andrews was not searched or asked any questions in front of the desk. He was led straight back to the holding cell area. At that point, he still had all of his personal possessions on him, including his keys and cigarettes. There was another prisoner in the cell with him. Only after being placed in the cell did Respondent take away his belongings. Prior to taking Andrews into the cell the first time, Respondent gave his firearm to his partner.

While still in the car and later while being brought into the station house, Andrews was screaming and cursing at Respondent and telling him to loosen the handcuffs. Anybody in the area would have noticed Andrews screaming and cursing. Although he was being loud, he was not being aggressive. Andrews was in the cell for approximately ten minutes before Respondent removed the handcuffs. During this period, Andrews repeatedly asked Respondent to loosen the handcuffs and also asked him why he had been arrested. Andrews continued to be loud and curse even after the handcuffs were removed. At one point, the supervising officer stuck his head in the door and told him to calm down and that he was going to be released shortly. After Andrews was released from custody, Respondent instructed him to collect his belongings. While Andrews did collect his personal belongings, he left the summonses behind on the table. Andrews did not recall the Respondent speaking to anybody as they walked out of the building.

While Respondent was in the process of handcuffing Andrews a second time, his mother told him, "Don't worry about him. Let him handcuff you." Andrews explained

that he was not resisting and would have let the Respondent handcuff him anyway. When Respondent subsequently slammed him against the car, his chest and head made contact with the car. Being slammed against the car did not cause any injury, and he did not receive any medical treatment for what happened to him that day. At the time of the incident, he was not wearing a cast or bandage on his wrist. Ruiz got out of his car after Respondent started handcuffing him the first time. Several other passers-by also approached the area.

Andrews reiterated that he was sentenced to five years probation in 2001. He had been arrested for selling a firearm, but pleaded guilty to firearm possession. He testified that he did not actually possess the firearm and was lying in court when he took the plea. He explained that he took the plea because he would have probably been killed on the street had he exposed the gun's real possessor. Toward the end of his probation period, he was arrested for driving without a license.

Stewart has been employed as a heavy equipment operator for more than 50 years. Between September 12, 2001 and June 2002, he removed garbage and steel from Ground Zero, where he worked closely with Department personnel. He has a very good relationship with police officers and has never been convicted of a crime. He is married to Andrews' mother and has known Andrews since he (Andrews) was 14 years old.

On April 14, 2008, Stewart received a telephone call from his brother-in-law, informing him that Andrews had been arrested for "making noise in the street." Stewart knew that Andrews had gone to his brother-in-law's apartment to pick up tax papers. At

the time, Andrews' hand was injured from a car accident that had occurred several months earlier. Stewart proceeded to drive to the station house, picking his wife up at a friend's house on the way. At the station house, a sergeant informed him that Andrews would be released shortly and asked him to wait outside. Stewart waited outside with his wife, his brother-in-law, and Ruiz.

After waiting 15 to 30 minutes, Andrews walked out of the building, followed by Respondent. The sergeant and a second police officer also stood outside of the building. Stewart heard Andrews call Respondent "a faggot." At that point, Respondent rushed Andrews, pushed his face and stomach down on a car, put his hands behind him, and took him back inside the station house. Stewart heard the sergeant tell Respondent to "let it go." Stewart took this to mean that Respondent should leave Andrews alone. Andrews did not resist being handcuffed.

On cross-examination, Stewart testified that he was standing approximately 50 feet from the front door of the station house. Respondent and Andrews were talking to each other, but Stewart could not hear what they were saying until they got closer to his location. Andrews calling Respondent a faggot was the first thing that Stewart heard. When Stewart saw Respondent handcuff Andrews, he told Andrews, "Just take it easy, just calm, be quiet and listen to what the officer has to say." Stewart did not see Andrews be resistant, and Respondent did not need assistance. Fifteen to 30 minutes later, Andrews was released from custody a second time.

Upon questioning by the Court, Stewart testified that Respondent pushed Andrews onto the car immediately after Andrews called him a faggot.

Respondent's Case

Respondent testified in his own behalf

Respondent

Respondent, a seven-year member of the Department, is currently assigned to Police Service Area 8. As a result of his active arrest history, he has been assigned to his command's anti-crime team for the last year-and-a-half. He has made over 300 arrests during the course of his career. He has never before been the subject of Department charges. The only discipline he has received was the forfeiture of one hour for the loss of his Activity Log last year.

On April 14, 2008, Respondent was working regular patrol in a radio motor patrol vehicle (RMP) with a Police Officer Rodriguez. At approximately 6:30 p.m. that day, he observed Andrews walking away from a public housing building. Respondent noticed that as soon as Andrews saw "swiped at his right-hand side." Based on this movement, Respondent believed that Andrews might be carrying a firearm in his waistband. Respondent had made six or seven previous arrests for illegal firearms, and Andrews' behavior was consistent with those previous arrests. Respondent, while still in the car, asked Andrews if he lived in the area. He realized that he did not have probable cause at that point, and he did not physically restrain Andrews in any way. Andrews, who immediately became irate, started screaming and cursing. Andrews asked, "Why you guys always fucking harassing me?"

Respondent got out of the car and attempted to calm Andrews down. Andrews started to call other people over. Andrews continued to curse, and people were approaching the scene. When Respondent asked him for identification, Andrews replied, "I'm not giving you my fucking ID." At that point, Respondent determined that he would give Andrews a summons for disorderly conduct. He did want to issue the summons at the scene, though, because "there were already people there and the way [Andrews] was acting." Respondent proceeded to place Andrews in handcuffs and transport him to the command. In his description of the handcuffing process, Respondent stated that Andrews "didn't resist but he wasn't compliant. [Andrews] just didn't offer his hands behind his back." Respondent had to place Andrews' hands behind his back. This was the first time that he had physical contact with Andrews. Respondent did not recall Andrews ever saying anything about a hand injury or protesting that the handcuffs were too tight.

On the ride to the command, Andrews continued to curse and yell. Respondent did not have any trouble getting Andrews out of the Department car. Once inside the command, Respondent presented Andrews to the desk officer, Sergeant Romero. [Respondent's Exhibit (RX) A is a copy of the Command Log for the day of the incident. The desk officer noted in the log that Andrews was combative.] At some point before placing him in a cell, Respondent removed Andrews' keys, cigarettes, and any other personal property. This was the first time that Respondent searched Andrews' pockets. Once Andrews was situated inside a cell, Respondent prepared two summonses: one for disorderly conduct and another for unreasonable noise and obscene language. [RX B is a copy of the two summonses issued to Andrews on the day of the incident.] The

Respondent also ran a basic warrant check on Andrews. This process lasted ten or 15 minutes. Andrews continued screaming during this period. Respondent explained that before entering the cell, he would have left his firearm with his partner or at the desk since guns are not permitted inside the cells.

After conducting the warrant check, Respondent handed Andrews the two summonses. Andrews picked up his property, and then Respondent escorted him out of the building. As Respondent was re-entering the command, Romero informed him of a new type of check that should have been conducted. This new check was to see if Andrews' name appeared on a Housing Authority trespass list. His name on this list would have meant that Andrews would be prohibited from entering any public housing development. Checking the trespass list was a procedure that began only a few months earlier and Respondent had forgotten to do it in Andrews' case. Respondent asked Andrews to come back inside, telling him that he could wait on a bench instead of going back inside a cell. Andrews became irate. Andrews started yelling and cursing again so Respondent handcuffed him a second time, brought him back inside the building, and placed him in a cell again. At no point, according to Respondent, did he throw Andrews against a car. When the check came back with negative results, Respondent asked the sergeant to have somebody else release Andrews. Respondent did this because he wanted to avoid more problems. Respondent slammed Andrews against a wall or cell bars. Andrews never complained of injuries. According to the Command Log, Andrews was arrested at 6:30 p.m. and released at 7:00 p.m.

On cross-examination, Respondent testified that he had neither probable cause nor reasonable suspicion when he initiated the encounter with Andrews. It was possible that

somebody in the crowd told him about Andrews having an injured wrist, but he did not specifically recall this. Respondent frisked Andrews after handcuffing him the first time, but he did not conduct a full search. It would have been proper procedure to search Andrews before placing him in the Department vehicle, but Respondent did not do so even though he suspected Andrews of having a weapon. Respondent described Andrews as being combative throughout their entire interaction, and he was upset by Andrews' conduct. Andrews, nevertheless, got in and out of the car on his own accord. Respondent agreed that "faggot" is a provocative word, but police officers are expected to exercise restraint when they hear provocative language. Throughout the incident, Andrews repeatedly questioned the justification for the stop.

On redirect examination, Respondent reiterated that he frisked Andrews before placing him in the Department vehicle, but he did not conduct a full search. He explained that he was not going to stay at the scene for a search while a crowd was gathering. By the time he placed Andrews in the car he was confident that Andrews did not have a gun. He went on to conduct a thorough search of Andrews at the station house. Respondent explained that he described Andrews as being combative because from the initiation of the stop to the time of release "it was non-stop cursing, non-stop obscene language, yelling." Although Andrews' conduct upset him, it did not affect the way he did his job. While Andrews never flailed his arms or attempted to run away, he did not voluntarily bring his hands behind his back to be cuffed. Bringing his hands behind his back was the only force that Respondent needed to use against Andrews. Andrews was not charged with resisting arrest.

On recross-examination, Respondent testified that at the scene he patted down Andrews' pockets and also checked his waistband. Respondent did not recall if he ever specifically - to place his hands behind his back.

Upon questioning by the Court, Respondent testified that after walking out of the station house with Andrews, he informed Andrews that there was one more check that needed to be conducted. He did not place Andrews against a car while handcuffing him the second time.

Upon further recross-examination, he stated that when he handcuffed Andrews . . . just needed to bring Andrews back inside while he checked the trespass list.

FINDINGS AND ANALYSIS

Respondent stands charged herein with abusing his authority as a member of the New York City Police Department in that he stopped DeMaurice Andrews (Andrews) without sufficient legal authority. Respondent is found Not Guilty. Evidence adduced at trial established that Respondent was on routine patrol of the housing projects in his designated police service area when he observed Andrews. Respondent testified credibly that he observed Andrews "blade" his body away from the RMP and "swiped at his right-hand side" just as Respondent's patrol car came within close proximity to him. Respondent said that in his experience as a police officer (at that time he had made over 200 arrests, some of which were for gun possession), he noted that people carried illegal

handguns not in holsters, but in their waistbands. Upon observation of the police, they would shift their body to either change the position of the gun or push it down.

Respondent acknowledged that he did not have probable cause to arrest Andrews, but he did have an articulable reason to question him further. Respondent testified that without exiting his RMP, he asked Andrews if he lived in the area and Andrews began to "make a scene." He described Andrews as becoming obscene, uttering profanity, and every other word was "fuck," so Respondent exited his vehicle.

Respondent testified that he asked Andrews for identification and Andrews responded that he was not going to give him his "fucking ID." Respondent stated that Andrews' behavior became such that he decided that he was going to issue Andrews summonses for disorderly conduct, but since he [Andrews] was calling out to people and a crowd began to gather, that he would issue the summonses at the station house for safety reasons. The command was a block away. Respondent stated that Andrews was placed in handcuffs. Andrews was not resisting, but he was not cooperating either in that Respondent had to put Andrews' hand behind his back to place the handcuffs on him.

This tribunal has held that where a police officer is performing his official duties and acting in good faith, his suspicion, even if mistaken, does not amount to misconduct. See

March 28, 2004

although
mistaken, by searching the vehicle of a complainant) Respondent is not charged with abusing his authority for forcibly stopping Andrews, he is charged with

abusing his authority for stopping him without sufficient legal authority. A police officer patrolling the housing developments in the City of New York in the course of performing those functions has a right to stop and question someone and ask him or her if they reside in the area. See People v De Bour, 40 N Y 2d 210 (1976), which delineates the four levels of police street encounters, including Level I Request for Information and Level II Common-Law Inquiry). Although Andrews may have had the right to walk away from the inquiry which Respondent initially made while he was inside of the RMP, Andrews did not chose that option. Andrews, however, did not have the option to ignore the directives of a police officer to supply identification and engage in disorderly conduct toward Respondent which resulted in his subsequent removal to the station house and issuance of two disorderly conduct summonses.

Respondent testified that Andrews' behavior resulted in his exiting the RMP. When he asked him for identification, Andrews became more belligerent and used profanity as he refused to provide identification. Respondent took him into custody for disorderly conduct. Penal Law § 240.20 subdivisions 2 and 3 state in sum and substance that "A person is guilty of disorderly conduct when, with intent to cause public inconvenience, annoyance or alarm or recklessly creating a risk thereof he makes (2) unreasonable noise and (3) in a public place, he uses abusive or obscene language, or makes an obscene gesture." In this instance, as Respondent attempts to perform his official police officer duties, he does not have to contend with a member of the public who refuses to comply with his directives and makes unreasonable noise and uses abusive or obscene

language as he asks him a rudimentary question. He has options and can take said person into custody for such disorderly behavior. Andrews may have had plans to take his W-2 tax paperwork to H & R Block, but at the point he encountered the police, he had an obligation to address that situation and comply with the directives or face the consequences.

Even if Andrews had a right to exercise his free speech in a profane way, he did not have the right to ignore the request from Respondent to supply his identification. Andrews' profane language was indicative of his attitude of lack of cooperation and one simply cannot ignore the orders of the police.

Andrews testified that when Respondent asked him if he lived in the area and he responded, "No," the situation escalated. He made no mention that Respondent asked him for identification and he refused. Such refusal resulted in his transport to the station house to verify his identity and for the issuance of the disorderly conduct summonses which could have been issued on the street but for Andrews' actions.

Accordingly, I find Respondent Not Guilty of Specification No. 1.

Specification No. 2

Respondent stands charged herein with using excessive force against Andrews in that he wrongfully pushed him against a wall in the station house of Police Service Area 8. Respondent is found Not Guilty.

Andrews testified that once he was dragged out of the police car, he was pushed against a wall in the command, pushed against the bars of the cell and then

pushed into the cell. Once released from police custody and exiting the building some 45 minutes later according to Andrews, he heard his mother telling him to relax as he gave Respondent his hand and was handcuffed again and led back into the station house.¹ At no point did Andrews state that he told his mother or stepfather (Stewart) that he was pushed against a wall or into the bars of a cell. Andrews denied that Respondent ever struck or kicked him while he was in the cell area and he denied that he was injured or sought any medical attention as a result of his treatment on the incident date.

The Respondent on the other hand, denied slamming Andrews against a wall or cell bars. He testified that Andrews never complained of any injuries and that according to the Command Log, Andrews was arrested at 6:30 p.m. and released from police custody at 7:00 p.m. In addition, Andrews acknowledged that the desk officer came back to the cell area. He never reported to him that he was pushed into the cell bars by Respondent. What was noted by the desk officer in the Command Log was that Andrews was combative. (See RX A.)

Andrews appears to have embellished on his treatment while in police custody which is not supported by any medical evidence or corroborated by Stewart, his stepfather, who testified before this tribunal. Stewart was present when Andrews was released from police custody and he made no mention that Andrews complained of being pushed into the cell bars while in custody.

Accordingly, I find Respondent Not Guilty of Specification No. 2.

¹ Respondent testified credibly that as he was releasing Andrews, he was informed by a supervisor that he had to perform a new additional housing trespass check on Andrews. Once he told this to Andrews, Andrews refused to return for the additional check and had to be handcuffed again and led back into the station house a second time.

Specification No. 3

Respondent stands charged herein with using excessive force against Andrews in that he wrongfully pushed him against a patrol vehicle and slammed his head against the hood of said vehicle. Respondent is found Not Guilty as charged. Evidence adduced at trial established that as Andrews exited the station house the first time, Respondent followed behind him and words were being exchanged between them. Respondent testified that he was telling Andrews that he needed to run a further warrant check on him, that he would not have to reenter the cell area and that it would not take too long. However, Andrews refused and Respondent had to use force to place handcuffs back on Andrews and return him to the station house to run the additional check he was advised of by a supervisor. Respondent denied putting Andrews against a car to handcuff him.

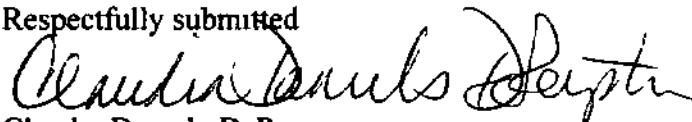
Andrews testified that as he walked out of the building, he told Respondent to "stop acting like a faggot" and Respondent jumped on him, handcuffed him and slammed him down on the hood of a car. He did not describe his head hitting the hood. His stepfather testified that after Andrews called Respondent a faggot, Respondent pushed Andrews' face and stomach onto a car and handcuffed him. He did not testify that Andrews was slammed onto the car.

By all accounts from Andrews, his stepfather and Respondent, a police officer as well as a sergeant were on the front steps of the station house as Andrews walked out. Although the stepfather described Andrews being pushed onto a car and handcuffed, it is unlikely that Respondent would engage in excessive force in the presence of a supervisor. What is likely is that Andrews

was not being cooperative as he had been throughout the entire encounter and Respondent was forced to place him back in handcuffs to get him back into the station house to run the required check Andrews's stepfather may have observed the force used to place Andrews in handcuffs, but such force was not excessive but necessary force Andrews was not freely being escorted back into the station house He may have ended up on a car as the handcuffs were being placed on him, but he did not sustain any head injuries, bruises or contusions and as such, it is unlikely that his head was slammed against the hood of the car as the charge alleges

Accordingly Respondent is found Not Guilty of Specification No 3

Respectfully submitted



Claudia Daniels-DePeyster

Assistant Deputy Commissioner-Trials

APPROVED



NOV 01 2011
RAYMOND W. KELLY
POLICE COMMISSIONER